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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

HALINA GRZELCZAK, Plaintiff and Respondent, v. ELENA GUTIERREZ, Defendant and Appellant.	B285177 (Los Angeles County Super. Ct. No. 17PSRO00381)

APPEAL from an order of the Superior Court of Los Angeles County, Martha A. Matthews, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

Daniel G. McMeekin for Defendant and Appellant.

Halina Grzelczak, in pro. per., for Plaintiff and Respondent.

Appellant Elena Gutierrez appeals from a restraining order issued in favor of Halina Grzelczak. Elena and Halina[1] are members of the same homeowners' association for a condominium complex (HOA). The trial court granted Halina's request for a restraining order based on a verbal altercation Elena had with Halina and Halina's husband, Andrzej Grzelczak, during which Elena photographed Andrzej, yelled at Halina and Andrzej, and called the sheriff's department. On appeal, Elena contends her actions do not rise to the level of civil harassment contemplated by section 527.6 of the Code of Civil Procedure.[2] We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Halina's Request for a Restraining Order*

On August 4, 2017 Halina filed a request for a restraining order against Elena. The request arose from an incident on the evening of June 8, 2017 at the condominium complex in which Halina lived and Elena owned a unit. Halina stated in her request, under penalty of perjury, that Elena had "[l]oudly announc[ed] as [Elena] entered the [HOA] meeting that she had called the Sheriff's Department on my husband and that she was departing to wait for the deputies to arrive at my residence after my husband complained to her about leaving her minor children unsupervised on the steps of my unit. My husband, who suffers from several maladies, including a bad heart, was very upset

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1 We refer to the parties by their first names for the sake of convenience and clarity.

2 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

when I talked to him on the phone from the meeting and when I got up to my unit following the end of the meeting. I was afraid for his safety because of his bad heart when Elena was there with the deputies filing a police report about the incident."

Halina also declared that on February 10, 2015 "[m]y hip and thigh were injured when [Elena] pushed me up against the building wall . . . ." Halina added, "She also flashed a camera in my face, which caused problems with my vision in eyes that were injured many years ago." Halina sought protection for herself, Andrzej, an HOA board member, and three HOA association members. She declared as to the additional people for whom she sought protection that Elena was "harassing these people by snapping photos without permission, [and] distributing hateful and sometimes false accusations by letters to residents of [the HOA]."

Halina attached her statement to the request, in which she stated Elena had harassed her since 2014 when Halina became president of the HOA.[3] According to the statement, in 2015 Elena passed out defamatory literature about Halina in HOA meetings, took photographs of her, and twice physically assaulted her. The same year Elena filed four lawsuits in small claims court against the HOA, in which she used as evidence the photographs she took of Halina. According to Halina, the HOA won three of the lawsuits, losing one on a technicality.

Halina stated that on June 8, 2017 Elena left her children at a table in a common area in front of Halina's condominium unit while Elena attended the HOA meeting. Elena could have

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[3] Although the statement is not signed, Halina stated in her request under penalty of perjury that all information in the request "and on all attachments is true and correct."

left her children in front of her own unit, but left them outside Halina's unit "deliberately intending to harass me." Elena's children were playing on Halina's steps when Andrzej came outside and told the children to find their mother. When Elena returned with her children, Andrzej told her "he was not her babysitter," and she had "no business leaving minor children out in the open without supervision." Elena responded, "[G]o back inside and watch your soccer game." Elena called the sheriff's department, entered the HOA meeting, and announced to those in attendance "she had called the Sheriff[']s Department because [Andrzej] was 'terrorizing' her children."

On August 4, 2017 the trial court issued a temporary restraining order prohibiting Elena from harassing or contacting Halina and Andrzej, but the court denied relief as to the other HOA members. The court set a hearing for August 22. In the notice of hearing the court noted the two-year gap between the 2015 incidents and the June 8 incident and asked, "Why was nothing done for over 2 years?" As to Halina's claim Elena had harassed the other HOA members, the court wrote, "To the extent the papers [Elena] passes out are 'sometimes false,' you can sue her for it."

B. *The Hearing on Halina's Petition*

At the August 22, 2017 hearing, Halina offered into evidence her own declaration, as well as declarations from Michael Archer, who was the treasurer and secretary of the HOA, Andrzej, and six individuals who lived in or owned units in the

same condominium complex.[4] The declarations were signed under penalty of perjury. In their declarations, Halina and Andrzej recounted their version of the events of June 8, which were consistent with Halina's statement in support of her request for a temporary restraining order. Halina added that Elena had been "stalking" her over the prior three years, including taking photographs and video of Halina and Andrzej, but Halina failed to provide details as to the timeframe of the conduct.

Andrzej stated in his declaration that on the evening of the HOA meeting, Elena left her two boys, the younger of whom looked like he was four or five years old, in the common area that had tables and chairs in front of his unit. The younger boy "had gotten up from the table and began jumping off the steps to [the Grzelczaks'] front door." Andrzej asked the boys what they were doing there, and when they responded their mother had told them to stay there, Andrzej directed them to find their mother.

The boys left, then returned with Elena two or three minutes later. Elena yelled at Andrzej that he was " 'terrorizing' her kids and that they had the right to stay there because it was [a] common area." Elena called the sheriff's department and yelled at Andrzej to " '[g]o back and watch [his] soccer game!' " When the sheriff's deputies arrived, Elena told them Andrzej had upset her children and blown cigarette smoke in her face. Elena took photographs, and Andrzej told her to stop taking photographs without his permission. He added, "I'm not your kids' babysitter." The deputies then questioned Andrzej about the event. He "was very upset about the situation, since this had

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[4] On our own motion we augment the record with exhibit A, which contains the declarations admitted at the hearing. (Cal. Rules of Court, rule 8.155(a)(1)(A).)

never happened to [him] before." Andrzej was currently staying home on disability as a result of back problems, heart-related issues, and other medical conditions.

The declarations of Halina's neighbors detailed interactions the neighbors had with Elena in 2011, 2014, and 2015, as well as the June 8, 2017 incident. Edward Dodge described that Elena and her husband talked for longer than is allowed at the October 9, 2015 meeting, made accusations against the HOA board members, and "began quarreling with the other homeowners." Elzbieta Kobylecki described the June 8, 2017 HOA meeting and that after the meeting Andrzej "was visibly upset, his hands were shaking from his experience and [Elena's] accusations . . . ." She also stated that prior to the meeting Elena was taking photographs through Kobylecki's living room window and locations on the sidewalk outside of her home.

The trial court admitted all the declarations.[5] However, when Halina started to discuss the 2015 incident, the court stated, "Anything that happened that long ago, I'm going to exclude from evidence as too remote. [¶] . . . [¶] Harassment cases really do focus on the present." The court limited testimony to "the current dispute, which is about threats, harassment, any kind of harassing conduct against Ms. Grzelczak in the present."

Halina called Archer as a witness, who testified that "for a number of years now [Elena] has been harassing Halina." In his declaration he described the harassment as including her repeated complaints, four lawsuits, "tempestuous" behavior at an

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[5] The trial court allowed Elena an opportunity to object to admission of the declarations at the hearing, but she did not. Neither does she assert on appeal the trial court erred in admitting the declarations.

internal dispute resolution conference, and threats to sue the HOA. Archer added that "Elena goes out of her way to harass Halina," pointing out that Elena purposefully sits in the common area outside Halina's unit and walks on the sidewalk outside the unit, although he did not provide a timeframe for the conduct. Archer testified he was present at the June 8 HOA meeting when Elena told Halina that Andrzej was "terrorizing her children and she needed to call [the] sheriff's deputies." Elena then spoke for three minutes as part of the meeting before leaving "to wait for the sheriff's deputies to get there." Elena's statements "agitated Halina." After the meeting, Archer and others met up with Andrzej. Andrzej's "hands were shaking from this. He was visibly upset." Archer and others had to calm Andrzej down. On August 7 and 8, following the internal dispute resolution conference, Elena sent Archer four e-mails "to pass on to Halina and the board," in which Elena "threaten[ed] another lawsuit, talking about defamation of character and things of this sort."[6]

Halina testified Elena was banned from HOA meetings two times over the prior three years, including the June 8 meeting. Each time Elena was banned from the meetings for six months. According to Halina, Elena and her husband were banned because "you guys fight everybody. It almost came that your husband and another homeowner almost got in [a] fight, . . . fist [fight]." However, when Elena asked about the first time she was

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[6] The trial court marked Elena's e-mails as an exhibit, but did not admit them into evidence. The court also marked as exhibits a letter from Andrzej's doctor and copies of disabled placards issued to Halina and Andrzej, but the court did not admit the documents.

banned, which occurred in 2015, the court again asked the parties to confine themselves to events in 2017.

The remainder of the hearing addressed the status of the table and chairs in front of Halina's unit, and whether Elena and her husband, Efrain Gutierrez, needed to pass by Halina's unit to walk from the parking area to the Gutierrezes' unit or to use the common area for a meeting with their tenant.[7] The court found that it was not credible that Elena needed "to sit in the table and chairs directly outside of [Halina's] unit." The court did not make other findings, but granted Halina's request for a restraining order. The restraining order prohibited Elena from contacting, harassing, stalking, or disturbing the peace of Halina and Andrzej. The order allowed Elena to be present on the HOA property "only for legitimate business purposes including entering the unit she owns, meeting with her tenant(s) and attending HOA meetings." The order prohibited Elena from coming within 50 feet of Halina and Andrzej, except that Elena

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[7] Efrain and Elena both testified the common area in front of the Grzelczaks' condominium unit was the only common sitting area in the condominium complex. The Gutierrezes had a tenant living in their unit, which they were remodeling. Elena claimed it was appropriate for her to sit in the common area as a "visitor" while she was meeting with her tenant about the remodeling. She added she could not leave her children in front of her unit because the driveway to the complex was in front of her unit, and "cars are coming so fast." Archer testified that an owner could wait for a tenant in his or her own unit's patio or a stairway in the complex. He also asserted that under the bylaws, Elena and Efrain did "not have the right to use facilities within the common area, [including] the table and chairs [because] . . . once they have given up the rights by renting out their place, those rights revert to their tenant."

could come within five feet of Halina and Andrzej while she was attending an HOA meeting. Further, Elena "may not confront, harass or threaten" Halina and Andrzej at an HOA meeting. Elena timely appealed.

DISCUSSION

A. *Standard of Review*

"We review issuance of a protective order [under section 527.6] for abuse of discretion, and the factual findings necessary to support the protective order are reviewed for substantial evidence." (*Parisi v. Mazzaferro* (2016) 5 Cal.App.5th 1219, 1226 (*Parisi*); accord, *Harris v. Stampolis* (2016) 248 Cal.App.4th 484, 497 ["'The appropriate test on appeal is whether the findings (express and implied) that support the trial court's entry of the restraining order are justified by substantial evidence in the record.'"]; *R.D. v. P.M.* (2011) 202 Cal.App.4th 181, 188 [same].) However, "whether the facts, when construed most favorably in [petitioner's] favor, are legally sufficient to constitute civil harassment under section 527.6, and whether the restraining order passes constitutional muster, are questions of law subject to de novo review." (*R.D.*, at p. 188; accord, *Parisi*, at p. 1226; *Harris*, at p. 497.) "'We resolve all conflicts in the evidence in favor of . . . the prevailing party, and indulge all legitimate and reasonable inferences in favor of upholding the trial court's findings. [Citation.] Declarations favoring the prevailing party's contentions are deemed to establish the facts stated in the declarations, as well as all facts which may reasonably be inferred from the declarations . . . .'" (*Parisi*, at p. 1226; accord, *Harris*, at p. 499.)

B. *Standard for Issuance of a Civil Harassment Restraining Order Under Section 527.6*

Under section 527.6, subdivision (a)(1), "A person who has suffered harassment . . . may seek a temporary restraining order and an order after hearing prohibiting harassment as provided in this section." Harassment is defined as "unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose." (§ 527.6, subd. (b)(3).) A course of conduct is defined as "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an individual, making harassing telephone calls to an individual, or sending harassing correspondence to an individual by any means, including, but not limited to, the use of public or private mails, interoffice mail, facsimile, or email." (§ 527.6, subd. (b)(1).) "'Section 527.6 was enacted "to protect the individual's right to pursue safety, happiness and privacy as guaranteed by the California Constitution." [Citations.] It does so by providing expedited injunctive relief to victims of harassment.'" (*Parisi, supra*, 5 Cal.App.5th at p. 1227; accord, *Brekke v. Wills* (2005) 125 Cal.App.4th 1400, 1412 (*Brekke*).)[8]

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[8] The Legislature enacted section 527.6 to provide prompt relief for harassment in response to a widely publicized story of a young woman whose stalker followed her every day, sent her numerous gifts, swathed her car in red and white camellia blossoms, called her 40 times a weekend, and followed her to her parents' home 150 miles away. (*Diamond View Limited v. Herz* (1986) 180 Cal.App.3d 612, 619; see Assem. Com. on Judiciary, Digest of Assem. Bill No. 3093 (1977-1978 Reg. Sess.) as amended

"If the judge finds by clear and convincing evidence that unlawful harassment exists, an order shall issue prohibiting the harassment." (§ 527.6, subd. (i).) After finding harassment, upon a showing of good cause, the court may include named family or household members in the restraining order. (§ 527.6, subd. (c).)

"The statute does not require the court to make a specific finding on the record that harassment exists, nor does it require specific findings of the statutory elements of harassment as defined in subdivision (b)." (*Ensworth v. Mullvain* (1990) 224 Cal.App.3d 1105, 1112; accord, *Cooper v. Bettinger* (2015) 242 Cal.App.4th 77, 92.) Rather, the granting of the injunction implies the trial court found there was conduct constituting harassment under section 527.6. (*Ensworth*, at p. 1112 [upholding issuance of injunction under § 527.6 based on implied findings appellant engaged in harassing course of conduct that caused substantial emotional distress where appellant followed her prior psychologist, surveilled her house, called her repeatedly, and sent her threatening letters after psychologist terminated treatment].)

April 24, 1978.) Section 527.6 defines harassment in language similar to the crime of stalking under Penal Code section 646.9, subdivision (e), which provides that harassment is the "knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose." Further, for purposes of stalking, a course of conduct is defined as "two or more acts occurring over a period of time, however short, evidencing a continuity of purpose." (Pen. Code, § 646.9, subd. (f).)

C. *The Trial Court Abused Its Discretion by Issuing the Restraining Order Based on Legally Insufficient Facts*

The trial court issued the restraining order based only on events that took place in 2017, including the June 8, 2017 HOA incident and the four e-mails Elena sent to Archer after issuance of the temporary restraining order.[9] Elena contends these actions fall short of the legal standard for harassment. We agree.

1. *Elena's threat to file a defamation lawsuit and her filing of a complaint with the sheriff are constitutionally protected conduct*

Elena's transmission of e-mails to the HOA board threatening to sue for defamation and "other things" and her filing of a claim with the sheriff's department may not be considered part of a harassing course of conduct because they are protected by the constitutional right to petition. Under section 527.6, subdivision (b)(1), "[c]onstitutionally protected activity is not included within the meaning of course of conduct."

The right to petition the government, including by filing a lawsuit or making a complaint to the police, is constitutionally protected activity. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 736, fn. 5 ["Our past pronouncements emphasize that the right of access to courts is an aspect of the First Amendment right of petition."]; *Harris v. Stampolis, supra*, 248 Cal.App.4th at p. 502, fn. 5 [constitutionally protected conduct could not be considered as part of course of conduct, noting defendant's "filing of a harassment complaint . . . and his complaint of false imprisonment to the police were not considered

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[9] Halina did not object at trial or in her appellate brief to the trial court's decision to exclude evidence of events prior to 2017.

in [the trial court's] determination that harassment had occurred"]; *Byers v. Cathcart* (1997) 57 Cal.App.4th 805, 809 [claim plaintiff caused police department to issue a citation and "used the 'legal system (i.e., Police and Courts) to harass, annoy and cause needless expenditure of money and time'" could not be considered in analysis of sufficiency of the evidence to support injunction under § 527.6].)[10]

"'"'[F]acts that are germane to" the First Amendment analysis "must be sorted out and reviewed de novo, independently of any previous determinations by the trier of fact." [Citation.] And "the reviewing court must "'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect."'"'" (*Parisi, supra*, 5 Cal.App.5th at p. 1226, quoting *DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 Cal.4th 864, 889-890.)

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[10] Although the right to petition does not provide protection for baseless litigation (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 64), the exception for baseless litigation also requires the legal action be filed for an improper purpose. (*Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1066.) Here, the record only shows the HOA prevailed on three of the four lawsuits, not that the three lawsuits were objectively baseless when filed or that Elena filed them for an improper purpose. Further, Elena asserted at multiple times during the hearing she had legitimate grievances with the board that could only be resolved in court. The trial court noted during the hearing that "whether [Elena has] a right to file a civil lawsuit in some other court" was not at issue in the current proceeding. Further, the trial court did not consider the lawsuits in issuing the injunction because they were filed in 2015, two years before the June 8 HOA incident.

Elena's filing of a complaint with the sheriff's department falls squarely within her constitutionally protected right to petition, which section 527.6 excludes from its definition of harassment. Therefore, as in *Byers v. Cathcart, supra*, 57 Cal.App.4th at page 809, Elena's filing of a complaint with the sheriff's department may not be considered as part of a harassing course of conduct.

Archer also testified that on August 7 and 8, following an internal dispute resolution conference, Elena sent him four e-mails "to pass on to Halina and the board," in which Elena "threaten[ed] another lawsuit, talking about defamation of character and things of this sort." The right to petition encompasses "'breathing space'" that protects nonpetitioning conduct that is "(1) incidental or reasonably related to an actual petition or actual litigation or to a claim that could ripen into a petition or litigation [where] (2) the petition, litigation, or claim is not a sham." (*Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1068 [defendant's hiring of private investigator to investigate possible legal claim was protected activity]; accord, *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1134, 1136 [in order to provide "'breathing space'" for exercise of constitutional right to petition, liability for inducing a party to file litigation may not be imposed unless lawsuit is a sham]; *Takhar v. People ex rel. Feather River Air Quality Management Dist.* (2018) 27 Cal.App.5th 15, 28 [agency's investigation of company's alleged violation of air pollution laws, issuance of notice of violation, and offer of settlement fell within protected """breathing space""" of right to petition].) "The sham exception has both an objective and subjective element: a petition or litigation must be objectively baseless, in that one could not reasonably expect it to succeed; and the person making the

petition or pursuing the litigation must be motivated by an improper purpose." (*Tichinin,* at p. 1072; accord, *Blank v. Kirwan* (1985) 39 Cal.3d 311, 321-322.)

Elena's e-mail communications with Archer on August 7 and 8 fall within the "breathing space" of her protected right to petition. The only information in the record as to the nature of the e-mails is Archer's testimony that Elena "threaten[ed] another lawsuit, talking about defamation of character and things of this sort." Because the e-mails were not admitted by the court, this single sentence does not show the threatened litigation was baseless or motivated by an improper purpose because there is no evidence of the basis of the alleged defamation (for example, what happened at the informal dispute resolution conference earlier in the day), or what were the other "things" alleged in the e-mails (for example, if they included grievances related to Elena's unit in the HOA).

2. *The June 2008 HOA incident does not meet the standard for harassment under section 527.6, subdivision (b)(3)*

Elena contends she did not engage in harassment of Halina or Andrzej as defined by section 527.6, subdivision (b)(3). Elena is correct that, considering only the June 8 HOA incident, she did not engage in a "course of conduct" directed at a specific person, and Elena's conduct would not cause a reasonable person to suffer substantial emotional distress.

A "single incident" is "insufficient to meet the statutory requirement of a course of conduct." (*Leydon v. Alexander* (1989) 212 Cal.App.3d 1, 4; accord, *Brekke, supra*, 125 Cal.App.4th at pp. 1413-1414.) In *Leydon*, over a five-minute period, respondent called his former supervisor a """pussy""" who was """fucking""" the

city manager. (*Leydon*, at p. 3.) He also told his supervisor's coworker, who was Black, she should "'be a good Negro and go back to her office.'" (*Ibid.*) Although the court found the respondent's actions "deplorable" (*Leydon*, at p. 5), it concluded the statements made by respondent as part of a single encounter constituted a single incident, and not, as required by section 527.6, subdivision (b)(1), a "'*series of acts* over a period of time, however short'" (*Leydon*, at p. 4). (Cf. *Brekke*, at pp. 1413-1414 [sending of three threatening letters to girlfriend to be opened by mother and separately taunting mother on telephone constituted course of conduct].)

As discussed, the trial court excluded evidence of events occurring before 2017 as too remote. The only conduct by Elena in 2017 that was not constitutionally protected was the June 8 incident. On that evening, Elena left her children at the table in the common area in front of the Grzelczaks' unit, took photographs of Andrzej, and yelled at him that he was "'terrorizing' her kids" and should "'[g]o back and watch [his] soccer game!'" Separately, Elena "[l]oudly announc[ed] as she entered the [HOA] meeting that she had called the Sheriff's Department on" Andrzej and told Halina that Andrzej was "terrorizing her children." Even if these actions on the same evening could be considered separate acts for purposes of a course of conduct, Elena's actions at the condominium unit were directed at Andrzej, and her actions at the HOA meeting were directed at Halina. Therefore, there was not "a series of acts" (§ 527.6, subd. (b)(1)) "directed at a specific person" (*id.*, subd. (b)(3)) that could constitute a harassing course of conduct.

In addition, substantial evidence does not support the trial court's implied finding Elena's conduct would cause a reasonable person to suffer "substantial emotional distress." (§ 527.6, subd.

(b)(3); see *Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762-763 [reversing grant of injunction under § 527.6 on basis neighbors playing basketball in their yard at a reasonable time, place, and manner would not cause a reasonable person substantial emotional distress]; cf. *Brekke, supra*, 125 Cal.App.4th at pp. 1413-1414, [defendant's "socially unacceptable course of conduct" in sending three "vile and vitriolic" letters to girlfriend intended for her mother, including urging his girlfriend to consider killing her parents, providing graphic details of how girlfriend could torture and kill her parents, and stating his intent to provoke the girlfriend or her father into physically attacking the mother would have caused a reasonable person to suffer substantial emotional distress].)

Although Elena's conduct in leaving her children in front of the Grzelczaks' unit and yelling at Halina and Andrzej would be annoying to a reasonable person, and the trial court found the conduct actually caused Halina and Andrzej to suffer substantial emotional distress, unlike the "vile," "vitriolic," and threatening letters in *Brekke, supra*, 125 Cal.App.4th at pages 1413-1414, Elena's conduct would not cause a reasonable person to suffer "substantial emotional distress." (§ 527.6, subd. (b)(3); see *Schild v. Rubin, supra*, 232 Cal.App.3d at pp. 762-763.)

Although we are sympathetic to Halina's challenge in dealing with a difficult neighbor, the remedy available under section 527.6 was not meant to address altercations between neighbors that do not rise to the level of harassment. The trial court therefore abused its discretion by issuing the restraining order.

DISPOSITION

The judgment is reversed, and the restraining order issued on August 22, 2017 is dissolved. The parties are to bear their own costs on appeal.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

SEGAL, J.